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In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

and

OAKLAND HOUSING AUTHORITY and HAROLD DAVIS,

Petitioners,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE CASE

Petitioners' sweeping no defense, no due process interpretation of 42 U.S.C. § 1437d(*l*)(6) (1994 & Supp. V 1999) ("section 1437d(*l*)(6)") is a stark example of governmental agencies going "off the deep end" in their so-called war on drugs by arbitrarily inflicting ruinous collateral damage to the rights of innocent tenants who are themselves the innocent victims of the scourge of drugs.[1]

This case arises out of Petitioners' efforts to evict four such innocent victims. Respondents Pearlie Rucker, Willie Lee and Barbara Hill are elderly women caring for extended families of children and grandchildren. They have lived in public housing for many years, one of them for 30 years. Petitioners seek to evict Ms. Rucker because her mentally disabled daughter was allegedly found in possession of crack cocaine three blocks away from Ms. Rucker's apartment. Petitioners seek to evict Ms. Lee and Ms. Hill because their grandchildren were allegedly in possession of marijuana in the housing complex parking lot. None of these women is accused of any personal drug activity, and the undisputed evidence before the district court established that Ms. Rucker, Ms. Lee and Ms. Hill had absolutely no knowledge of the alleged drug activity and took affirmative steps to warn their households against drug use. Respondent Herman Walker is an elderly disabled man dependent for daily life on an in-home caregiver. Petitioners wanted to evict Mr. Walker because his caregiver allegedly possessed crack cocaine and invited guests with drugs into the housing complex. Like the other Respondents, Mr. Walker is not accused of personal drug

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[1] In a 1989 lecture at the University of Georgia School of Law, a Justice of this Court warned against the erosion of individual rights in the war on drugs and expressed concern that "we have gone off the deep end a little to meet that crisis." *See* The Washington Post (April 9, 1989) (available at 1989 WL 2062157).

use and had no knowledge of the caregiver's alleged drug activity.

Petitioners contend that Congress intended to allow the eviction of innocent tenants like Respondents as part of the war on drugs. Specifically, Petitioners assert that, in enacting section 1437d(*l*)(6), which required the placement of anti-drug provisions in public housing leases, Congress expressly gave housing authorities unbridled discretion to deprive individuals and families of public housing without regard to the leaseholder's guilt or innocence. Petitioners also assert that the power to evict an innocent tenant is absolute, with no court empowered to review their exercise of discretion, no matter how arbitrary or inequitable.

The Ninth Circuit properly rejected Petitioners' extreme claims. The public housing and anti-drug legislation of which section 1437d(*l*)(6) is a part manifests Congress's intent that holders of public housing leases, just like private leaseholders, have a protected property interest that cannot be forfeited upon a showing of innocence by the tenant. It also makes manifest that Congress did not intend section 1437d(*l*)(6) to be an explicit or covert repeal of a tenant's due process and statutory right to retain a public housing lease when innocent of any wrongdoing.

SUMMARY OF ARGUMENT

• Nothing on the face of the statute supports Petitioners' claim that Congress intended to grant public housing authorities ("PHAs") the unfettered and unreviewable power to evict innocent tenants. Petitioners' argument, relying on the single word "any" as an unambiguous grant of unchecked power, would force the Court to find that Congress intended a statute with unlimited reach that encompassed patently absurd and unjust results that HUD itself has rejected.

• Applicable tools of statutory construction demonstrate that Congress intended to protect innocent tenants from being deprived of housing. Congress's statements confirm that section 1437d(*l*)(6) is subject to all applicable

due process and state law protections, including a defense of innocence.[2] Further, section 1437d(*l*)(6) and the lease forfeiture provisions in 21 U.S.C. § 881(a)(7) (2000) must be read consistently to provide an innocent tenant defense. Petitioners' policy contravenes the intent of Congress, as expressed through its statements and the statutory scheme as a whole, and is entitled to no deference.

• Under any standard, Petitioners' construction must be rejected because it undermines the purposes that Petitioners themselves proffer to justify the eviction of innocent tenants. By ignoring innocence and evicting despite a tenant's diligent efforts to discover and prevent drug activity, Petitioners' policy results in the removal of the very tenants who are willing to further Petitioners' interest in maintaining drug-free housing and virtually guarantees that tenants will never report the drug activity of household members or guests, for fear that they would be evicted along with the offender despite their innocence. Petitioners' exaggerated claim that an innocence defense will leave them powerless to deter drug activity is undercut by the availability of effective measures, recognized by HUD itself, that serve the goal of preventing drug activity without sacrificing the interests of innocent tenants.

• Under fundamental due process principles, terminating a public housing tenant's property right in his or her home based solely on association with an alleged wrongdoer and with complete disregard for the tenant's lack of culpability constitutes arbitrary and unconstitutional state action. Further, Petitioners' effort to deny Respondents and other innocent tenants any meaningful judicial review of eviction violates procedural due process protections.

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[2] Throughout this brief, "innocent tenant defense" refers to circumstances showing that the tenant did not know of or have any reason to know of illegal drug activity, or took reasonable steps to prevent the activity from occurring.

- PHAs are state actors and may not evade applicable constitutional limitations when imposing conditions on the receipt of public benefits, whether through contractual terms or otherwise. In addition, basic principles of contract law and equity call into question enforcement of a private lease to evict an innocent tenant.
- Forfeiture of property is impermissible under both due process and Eighth Amendment principles when it is applied against an innocent owner whose property was not used in connection with any wrongdoing.
- Petitioners' policy ultimately sends a profoundly anti-family message by pressuring tenants to exclude family members from their homes to ensure that their only realistic source of housing is not lost through drug activity that occurs without the tenant's knowledge and despite preventive efforts.

ARGUMENT

I. WHEN ENACTING SECTION 1437d(*l*)(6), CONGRESS INTENDED TO PRESERVE A TENANT'S DUE PROCESS RIGHT TO RAISE AN INNOCENT TENANT DEFENSE TO ANY EVICTION PROCEEDING.

A. Introduction.

Respondents agree that *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and related decisions frame the analysis in this case. Under familiar principles, this Court determines first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's construction must be "rational and consistent with the statute." *NLRB v. United Food and Commercial Workers Union,*

484 U.S. 112, 123 (1987); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In the end, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 476 U.S. at 843 n.9.

To determine whether Congress has spoken on the question at issue, the Court "should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132. Rather, " 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *Id.* at 133 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). This Court must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Id.* (quotations and citations omitted). This rule applies with particular force to statutes that are *in pari materia* like section 1437d(*l*)(6) and the closely related forfeiture provisions in 21 U.S.C. section 881(a)(7) ("section 881(a)(7)"). Statutes "enacted by the same legislative body at the same time" and "intended to serve the same function" should be harmonized and interpreted as if they were one law. *Erlenbaugh v. United States*, 409 U.S. 239, 244-45 (1972).

These principles firmly support the Ninth Circuit's conclusion that "Congress has spoken on the issue and that HUD's interpretation is contrary to congressional intent." HUD Pet. App. at 10a. Section 1437d(*l*)(6), when properly viewed through the lens of Congress's actions and the section's place in the overall framework of anti-drug legislation, is intended to protect innocent children, parents, grandparents and other tenants from the actions of overzealous governmental entities seeking to deprive them of public housing, without which they would be homeless. HUD's contrary interpretation in the face of this congressional intent is unreasonable and impermissible, and should be rejected.

B. Section 1437d(*l*)(6) And Section 881(a)(7) Embody Congress's Comprehensive Strategy For Dealing With Drug Activities In Public Housing.

The statutory framework surrounding HUD's actions is straightforward. The United States Housing Act, 42 U.S.C. §§ 1437, *et seq.* (2000) ("Housing Act"), sets out a comprehensive program to provide housing to the nation's poorest families and citizens. The Housing Act establishes local public housing authorities chartered under state law to administer housing programs. *Id.* at § 1437a(b)(6).

Congress originally addressed drug activity in public housing in the Anti-Drug Abuse Act of 1988 ("Anti-Drug Abuse Act") at Subtitle C, entitled "Preventing Drug Abuse in Public Housing." Pub. L. No. 100-690, § 5101 *et seq.*, 102 Stat. 4181, 4300-4301. This Subtitle implemented a comprehensive strategy against drug activity built on two key statutory components: sections 5101 and 5105. In section 5101, Congress enacted the original version of section 1437d(*l*)(6), on which Petitioners now rely in seeking to evict tenants personally innocent of any drug activity. Section 5101 instructed PHAs to add to public housing leases a clause providing that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Pub. L. 100-690, § 5101, 102 Stat. at 4300, codified at 42 U.S.C.A. § 1437d(*l*)(5) (1990).[3]

---

[3] Section 5101 defined "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell distribute, or use, of a controlled substance" under the Controlled Substances Act, 21 U.S.C. § 802. Pub. L. 100-690, § 5101, 102 Stat. at 4300.

At the time this legislation was being considered and adopted, the Housing Act imposed an extensive set of due process requirements obligating each PHA to "provide formal grievance procedures for the resolution of tenant disputes with the PHA arising out of their lease or PHA regulations." *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 426 (1987). These procedures, codified at 42 U.S.C. § 1437d(k), "include informal and formal hearings and administrative appeals, conducted within each PHA by impartial decisionmakers, to consider adverse decisions taken against tenants by the PHA." *Id.* Congress required that these minimum administrative due process protections be met before a PHA could seek an eviction, permitting them to be omitted only if the Secretary of HUD determined that the PHA's jurisdiction afforded tenants a court hearing with basic due process elements before eviction. 42 U.S.C.A. § 1437d(k) (1990).

As the second component of Congress's attack on drug activity in public housing, Congress created another mechanism whereby a governmental entity could terminate a public housing tenancy based on violations of drug laws. Section 5105 amended the forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881(a)(7), to include "any leasehold interest" in the categories of real property interests subject to forfeiture when "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of [the Controlled Substances Act] punishable by more than one year's imprisonment." Pub. L. 100-690, § 5105, 102 Stat. at 4301, codified at 21 U.S.C.A. § 881(a)(7) (1990). As the placement of section 5105 in Subtitle C makes clear, Congress specifically intended to apply federal civil forfeiture law to include public housing leases, as well as leases in the private sector. *See, e.g.*, 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (remarks of Senator Biden, a sponsor of the Anti-Drug Abuse Act, noting that section 5105 "allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing

leases are considered property with respect to civil forfeiture laws") (available at 1988 WL 182529); *see also U.S. v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1025-26 (E.D.N.Y. 1991) (recognizing application of section 881(a)(7) to terminate public housing leases).[4]

C. Section 1437d(*l*)(6) On Its Face Does Not Support The Grant Of Absolute Power To A Public Housing Authority To Evict An Innocent Tenant.

HUD seeks to evade the Ninth Circuit's holding by asserting that the "plain language of Section 1437d(*l*)(6) unambiguously authorizes eviction" of innocent tenants. HUD Br. at 14. HUD places the full weight of its "plain language" argument on Congress's use of the word "any" in section 1437d(*l*)(6). *Id.* at 19-20. In HUD's view, "any" means "indiscriminately," and Congress's use of this single adjective not only purportedly communicates an unambiguous intent to permit indiscriminate and arbitrary evictions of public housing tenants, but also affirmatively expresses Congress's intent to deprive a public housing tenant of any meaningful due process protections in seeking to avoid an eviction. *Id.* at 20.

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[4] HUD itself has acknowledged that section 5105 specifically applied federal forfeiture law to the revocation of public housing leases. *See Termination of Public Housing Tenancy for Drug-Related Criminal Activity*, 54 Fed. Reg 15,998 (April 20, 1989) (advising PHAs about the Anti-Drug Abuse Act and noting the availability of lease forfeiture under section 881(a)(7)); *121 Nostrand Avenue*, 760 F. Supp. at 1026 (noting formation of joint HUD-Department of Justice Public Housing Asset Forfeiture project to pursue public housing lease forfeitures under section 881(a)(7)). Indeed, in 1990, HUD Secretary Jack Kemp announced the launch of a coordinated strike in 23 cities to seize tenants' leases under the forfeiture provisions. *See* Stephanie Saul, *Activists Attempt to Halt HUD Eviction Program*, Newsday (June 16, 1990) (available at 1990 WL 3341537).

Respondents submit that the Ninth Circuit was right when it said: "The text of subsection (6), viewed in isolation, does not compel either party's interpretation." HUD Pet. App. at 13a. Petitioners' position finds no support in the isolated text of the statute, even if one were to read "any" as used in section 1437d(*l*)(6) literally. The section on its face merely directs that certain language be included in all public housing leases. It does not purport to mandate eviction, nor can it fairly be argued that it manifests an intent by Congress to deprive the tenant of his or her due process protections, including an innocent owner defense, in any eviction proceedings.

In making this "plain language" argument, HUD places great reliance on language found in *United States v. Monsanto*, 491 U.S. 600 (1989), and *United States v. Gonzales*, 520 U.S. 1 (1997). Neither case supports the position that HUD asks this Court to adopt. In *Monsanto*, the Court rejected the attempt by Monsanto to carve out an exception to the forfeiture of "all assets" to protect assets to be used to pay attorney's fees. In this case, Respondents are not seeking to carve out any exception to the language of section 1437d(*l*)(6); rather they assert that section 1437d(*l*)(6) does not address, nor purport to address, the due process protections that Congress intended to be applicable to any attempt to evict innocent tenants. In *Gonzales*, the Court held that reading the phrase "any other imprisonment" literally avoided a conflict with other federal statutes, avoided the absurd result found to exist by the Court of Appeals and was consistent with the internal language of the section itself. *Gonzales*, 520 U.S. at 5-9. None of these facts exist in this case. In fact, if the Court were to adopt the position urged by Petitioners, section 1437d(*l*)(6) would be inconsistent with Congress's intent as expressed in other statutes and legislative history and it would create the possibility of odd and absurd results.

Persuasive evidence is found in HUD's own actions that HUD does not really believe its "plain meaning"

interpretation is consistent with Congress's intent. If section 1437d(*l*)(6) is a mandate from Congress to HUD to have PHAs evict any tenant, regardless of innocence, from public housing units where there is a violation of a drug law by a household member, guest or other person over whom the tenant has control, where does HUD find the authority to advise PHAs that they can use discretion in applying this mandate? Where in this mandate does HUD find the direction from Congress to act "humanely"? In fact, HUD admits that nothing in section 1437d(*l*)(6) mandates eviction or addresses the procedures under which it should be conducted. HUD Br. at 20-22. Further conduct by HUD that belies its "plain meaning" interpretation is its post-hoc construction of section 1437d(*l*)(6). *See* HUD Br. at 45 (HUD "permits evictions only for drug-related criminal activity that occurs during the period that the individual is a household member or guest."). In the same vein, HUD recently "clarified" that drug possession or activity by a "commercial visitor" making a delivery would not support eviction in the absence of any other relationship with the tenant. *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776 at 28,782 (May 24, 2001).[5] These provisions reflect a clear understanding that Congress did not, in fact, mean "any" literally to exclude all defenses of innocence, as HUD now contends.

Also persuasive in rejecting Petitioner's "plain meaning" arguments are the absurd results that would arise if the Court were to accept HUD's reading of the word "any" and the unbridled power that would be conveyed thereby. *See Lewis v. United States*, 523 U.S. 155, 160 (1998) (rejecting literal meaning of "any"); *United States v. X-Citement Video,*

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[5] This change undoubtedly responded to concerns like the one expressed by the Supreme Court of Tennessee that HUD's interpretation would support the "absurd result" of permitting a PHA to evict a family when a "salesman or pizza delivery person enters a public housing tenant's apartment in possession of drugs." *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504, 512 (2001).

Inc., 513 U.S. 64, 69-70 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results."). Illustrative of the potential for such absurd results are HUD's own statements that section 1437d(*l*)(6) would allow a PHA to evict "an entire family" if a tenant's child was caught smoking marijuana 3,000 miles away, HUD Pet. App. at 22a, or that eviction of an innocent tenant would be permissible "if a household member had been convicted of a drug crime years earlier." *Id.* While HUD tries to dismiss these results as overheated and irrelevant hypotheticals, they are HUD's own statements of the purported powers of the PHAs under Petitioners' interpretation of section 1437d(*l*)(6). HUD suggests no way by which an innocent tenant could be protected against such arbitrary and capricious application of its interpretation of the lease provision by a PHA other than to suggest that PHAs act "humanely." As this case amply demonstrates, this is a rotten reed upon which to rely to prevent the eviction of an innocent tenant.

In addition to being without support, Petitioners' "plain meaning" arguments would have this Court ignore basic principles of statutory construction. To determine whether Congress has decided a disputed issue, "the reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* at 132-33. As the Ninth Circuit properly concluded, the text of section 1437d(*l*)(6) "viewed in isolation" does not compel a particular conclusion about Congress's intended treatment of innocent tenants. HUD Pet. App. at 13a. Consequently, Congress's intent in section 1437d(*l*)(6) emerges not from a myopic analysis of isolated definitional possibilities in the word "any" but

from section 1437d(*l*)(6)'s legislative history and its place in the overall statutory scheme.[6]

D. Well Settled Principles Of Statutory Construction Demonstrate Congress's Intent To Allow A Tenant To Present An Innocent Tenant Defense To Any Threatened Eviction By A Public Housing Authority.

HUD finds it necessary to torture the word "any" into a non-existent clarity because the other tools of statutory construction strongly support the Ninth Circuit's decision. It was Congress's intent to protect tenants from the arbitrary and capricious enforcement of the provision of the lease contained in section 1437d(*l*)(6), including the right of innocent tenants to establish their innocence as a defense to the eviction action. Consequently, HUD's

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[6] Petitioners' insistence that section 1437d(*l*)(6) is crystal clear in its meaning also founders on its divided treatment in the courts. In this case alone, eight circuit judges and one district court judge found that Congress did not intend to authorize the eviction of innocent tenants. Courts in Pennsylvania and North Carolina have reached the same conclusion. *See Delaware County Housing Authority v. Bishop*, 749 A.2d 997 (Pa. Comm. Ct. 2000); *Charlotte Housing Authority v. Patterson*, 464 S.E.2d 68 (1995). The Tennessee Supreme Court also found that Congress did not authorize the eviction of innocent tenants in the context of drug activity by guests or other non-household members. *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (2001). When combined with Petitioners' list of decisions purportedly supporting HUD's interpretation, see HUD Br. at 41 n.15, the conclusion unavoidably follows that the interpretation of the statute is, at a minimum, highly unsettled. While HUD apparently attributes the sharp division in national judicial opinion to politics, the less cynical and more persuasive explanation is that section 1437d(*l*)(6) simply does not provide the "plain language" mandate HUD claims.

contrary interpretation of section 1437d(*l*)(6) is neither reasonable nor permissible.

Congress established in Subtitle C of the Anti-Drug Abuse Act a unitary scheme to address drug activity in public housing. Sections 5101 and 5105 share not only a common origin and overlapping application to the same public housing population, they also manifest, when properly analyzed, that Congress had no intent to prevent innocent tenants from asserting that defense against any threatened eviction. Neither HUD nor OHA points to any language in section 1437d(*l*)(6) that mandates such a result; neither HUD nor OHA points to any language in any legislative history that supports such a result. In fact, it is all to the contrary.

Just one year after enacting the Anti-Drug Abuse Act, Congress passed new legislation reflecting its recognition of due process rights of an innocent tenant. In 1989, Congress directed the Secretary of HUD to "review the drug-related eviction procedures of all jurisdictions having a [PHA]" to determine "whether such procedures meet Federal due process standards." Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, § 404(a), 103 Stat. 97, 128. If the Secretary concluded that a jurisdiction satisfied these standards, the grievance procedures mandated in section 1437d(k) would be superfluous and the Secretary could waive the requirement that a PHA follow them. Significantly, in permitting the Secretary to waive due process protections applicable under the Housing Act to drug-related evictions where local courts provided adequate procedural guarantees, Congress expressly stated that "evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy." Pub. L. 101-45, § 404(b), 103 Stat. at 129.

In 1990, Congress made applicable the eviction provisions of the Anti-Drug Abuse Act to Section 8 subsidized housing under the Housing Act. Again, Congress stated

that PHAs in jurisdictions providing tenants with adequate due process protections in a court hearing "prior to eviction" could be relieved of the due process obligations imposed by section 1437d(k) in cases involving alleged drug activity. Cranston-Gonzales National Affordable Housing Act of 1990 ("Affordable Housing Act"), Pub. L. 101-625, §§ 503(a), 546, 104 Stat. 4079 at 4184, 4220.

Congressional reports associated with the Affordable Housing Act strongly affirmed that Congress not only had no intention of abandoning the traditional notions of fairness and due process while pursuing its war on those who were victimizing innocent public housing tenants, but also that Congress deemed a tenant's lack of culpability to be a defense against any attempt to evict. In comments on the Act's application to Section 8 housing, the Senate Report of the Banking, Housing and Urban Affairs Committee unambiguously stated "the Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [sic]." S. Rep 101-316, at 127 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889. In additional comments on a bill proposing modifications to the Act that ultimately were not adopted, the Senate Report again underscored that "eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." *Id.* at 179, 1990 U.S.C.C.A.N. at 5941. Although made in relation to additional statutory language that was ultimately not included, the statement relates specifically to the scope of the housing authorities' discretion when seeking to evict innocent tenants, and it is directly relevant to the issue before this Court.

Significantly, no contrary evidence exists in Congress's deliberations. As the District Court found, Petitioners "cannot identify anything in the legislative history that unambiguously indicates that Congress specifically intended that a public housing authority may terminate a tenant's lease for drug-related criminal activity of someone

else even when the tenant had no knowledge, or no reason to know, of the criminal activity and no ability to control the person for whom HUD wants to hold the tenant responsible." HUD Pet. App. at 151a.

The complementary development of section 5105 further underscores that Congress was not prepared to sacrifice an innocent tenant's right to due process protections against wrongful eviction merely because the housing authorities wanted to use the threat of the loss of the lease as a weapon in its war on drugs. As section 881(a)(7) stated at the time Congress added leasehold interests, "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *See* 21 U.S.C. § 881(a)(7) (Supp. V 1987). By adding public housing leases to the purview of the forfeiture provisions of section 881(a)(7), Congress made clear its intent that holders of public housing leases, as well as private leaseholders, have a protected property interest that could not be forfeited upon a showing of innocence by the tenant. Court decisions applying this defense have barred termination of public housing tenancy when a tenant demonstrates she had no knowledge of drug activity and was not willfully blind to the existence of such activity. *See 121 Nostrand Ave.*, 760 F. Supp. at 1032-33.

Congress recently broadened the civil forfeiture law to provide tenants even more protections by moving and expanding section 881(a)'s protections into new forfeiture legislation. *See* Civil Asset Forfeiture Reform Act of 2000 ("Reform Act"), Pub. L. 106-185, 114 Stat. 202, codified at 18 U.S.C. §§ 983, *et seq.* (2000). The Reform Act substantially expanded the protections afforded to innocent public housing tenants and other property holders against property loss for drug activity. "Believing that a meaningful innocent owner defense is required by fundamental fairness," and seeking "to make that defense uniform" in all property revocation cases, H.R. Rep. No. 106-192, at 11-15 (1999) (available at 1999 WL 406892), Congress enacted an extensive

system of judicial procedures to guarantee that property is revoked only from culpable wrongdoers. The centerpiece of these procedures is Congress's mandate that an "innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." 18 U.S.C. § 983(d)(1). An "innocent owner" is an owner who "did not know of the conduct giving rise to the forfeiture." *Id.* at § 983(d)(2)(A)(i).[7]

Congress also acknowledged the special importance of protecting real property and, in particular, a person's home. Where forfeiture involves an interest in real property, the government may not seize the property without providing prior notice to the affected parties and obtaining a judicial order authorizing forfeiture. *Id.* at § 985. Further, when the property interest subject to forfeiture would result in the loss of a primary residence by indigent owners, Congress took the extraordinary step of guaranteeing free legal representation in civil forfeiture proceedings by a Legal Services Corporation attorney. *Id.* at § 983(b)(2)(A). In addition, Congress implemented procedures for claimants to challenge loss of property as constitutionally excessive under the Eighth Amendment. *Id.* at § 983(g).

Thus, Congress created section 1437d(*l*)(6) in the same Subtitle in which it expressly provided an innocent owner defense for public housing tenants by amending section 881(a)(7) to include public housing leases. Under familiar standards of *in pari materia* construction, it reasonably follows that Congress understood the same innocent owner defense to apply to all public housing tenants when confronted by the threatened loss of their leasehold interests. When two statutes serve, as here, the same function and result – elimination of drug use in public housing by imposing as punishment the loss of a leasehold interest by

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[7] The owner of the property interest subject to forfeiture bears the burden of proving innocence by a preponderance of the evidence. *Id.* at § 983(d)(1). The government's burden of proof is also a preponderance of the evidence standard. *Id.* at § 983(c).

reason of drug-related activities – "sensible construction" requires that they be treated as one law with consistent application. *Erlenbaugh*, 409 U.S. at 244-45; *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) (using Program Fraud Civil Remedies Act of 1986 ("PFCRA") to define term in False Claims Act ("FCA") because "the PFCRA was designed to operate in tandem with the FCA" and was "not only . . . enacted at virtually the same time as the FCA was amended . . . but its scope is virtually identical to that of the FCA.").[8] The meaning of one statute is particularly affected by related acts where Congress has spoken "more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133.

The need to reconcile statutes *in pari materia* is especially appropriate in this case. Unless the application of section 1437d(*l*)(6) is subject to due process protections comparable to those expressed in section 881(a)(7), the protection provided in section 881(a)(7) would become meaningless and easily avoided. The federal government, rather than going through the forfeiture procedures when seeking to punish for drug-related activities, would get the PHA to exercise what HUD asserts is the PHA's unfettered power to evict the innocent as well as the guilty. It could not have been Congress's intent to have added public housing leases to the forfeiture statute, with its attendant due process protections and, at the same time, provide in

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[8] *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible.") (quotations omitted) (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

section 1437d(*l*)(6) a means for circumventing those due process protections. *See United States v. Phommachanh*, 91 F.3d 1383, 1387 (10th Cir. 1996) (rejecting judicial deportations under 18 U.S.C. § 3583(d) because they would result in "illogical set" of rules allowing circumvention of procedural safeguards under closely related deportation statute at 18 U.S.C. § 1251 and would render other deportation sections meaningless); *United States v. Xiang*, 77 F.3d 771, 773 (4th Cir. 1996) (same); *see also Vermont Agency of Natural Res.*, 529 U.S. at 786 (noting "[i]t would be most peculiar" to permit substantial penalties under one statute but bar them under a closely related statute).

E. HUD's Attempt To Glean Congressional Intention From Congressional Inaction Or Other Statutory Analysis Should Be Rejected.

1. Negative Implication Is Inapplicable.

HUD argues that the fact that the innocent owner defense in section 881(a)(7) is not repeated in section 1437d(*l*)(6) indicates that Congress affirmatively intended to bar the defense in state eviction actions for alleged violations of section 1437d(*l*)(6). HUD Br. at 15, 28-30. This argument is without merit. Putting aside the fact that "negative implication" is a questionable basis for divining congressional intent, *see United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) ("Congress cannot express its will by a *failure* to legislate.") (Scalia, J. concurring in part and in the judgment) (emphasis in original); 2B Sutherland, Statutory Construction, § 49:10 at 112-14 (6th ed. 2000) ("Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute"), the argument must fail because of the irrational conflict that is created in two statutory provisions that are identical in purpose and result (*see* above and Section I.E.4 below). It also runs directly contrary to the imperative that this Court construe statutes as a " 'harmonious whole' " and "guided to a degree by common sense." *Brown & Williamson*, 529 U.S. at 133. As the Ninth Circuit properly

concluded, "[t]o say Congress could have drafted the defense more explicitly in § 1437d(*l*)(6) is not to say it did not do so at all." HUD Pet. App. at 18a. In addition, HUD's "negative implication" argument ignores completely the context in which the innocent tenant defense was included in section 881(a)(7).

2. No Adoption By Re-Enactment Or Amendment.

Petitioners' other effort to capitalize on congressional inaction is equally meritless. Petitioners put great emphasis on the failure of Congress, when it amended the predecessor versions of section 1437d(*l*)(6) in 1990 and 1996, to overrule what they contend was HUD's rejection and some state court rejections of the innocent tenant defense. HUD Br. at 37-42. In Petitioners' view, Congress's failure amounted to an "adoption" of HUD's interpretation. *Id.* at 42.

This Court has rejected the implied ratification theory in other contexts and should do so here. In *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), the Court rejected an SEC regulatory interpretation that the agency had followed since 1944. The SEC had attempted to preserve the interpretation by arguing, among other points, that Congress "should be considered to have approved the Commission's construction" because it had "re-enacted" the statute upon which the interpretation was based "without disapproving the Commission's construction." *Id.* at 119. The SEC claimed Congress acted knowingly because the agency in 1964, when the statute was re-enacted, informed the Senate Committee on Banking and Currency of its interpretation and the Committee approved that interpretation. *Id.* at 120-21 and n.9 & 10.

This Court declined "to presume general congressional awareness of the Commission's construction" on these facts. *Id.* at 121. As the Court explained:

> That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to

> invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

Id. at 121; *see also United States v. Calamaro*, 354 U.S. 351, 359 (1957) (deeming "re-enactment to be without significance" in absence of evidence of congressional discussion or other awareness of agency regulation); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (rejecting adoption of judicial decisions in re-enactment where decisions did not represent settled judicial construction); *ABC Rentals of San Antonio, Inc. v. C.I.R.*, 142 F.3d 1200, 1205 (10th Cir. 1998).

Petitioners' "adoption" claims here are no more persuasive. HUD did not promulgate regulations implementing section 1437d(*l*)(6) until 1991, and did not articulate until then its policy of eliminating the innocent tenant defense. HUD Br. at 40. Congress did not amend section 1437d(*l*)(6) again until 1996, *id.* at 41, and HUD makes no showing at all of the "widespread congressional awareness" needed to support the claim that Congress in 1996 knew about and intended to ratify the sweeping no-fault policy Petitioners sponsor.[9]

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[9] HUD's reliance on regulations published in 1988 also fails to support the claim that Congress knowingly adopted a no-fault eviction standard. HUD Br. at 38 n.13. Even beyond the facts that the regulations were promulgated only briefly before Congress passed the original version of section 1437d(*l*)(6) and had only short interim effect before being withdrawn, *id.*, nothing in the 1988 regulations expressly precluded an innocent tenant defense.

3. Other Statutory Provisions Relied Upon By HUD Do Not Support Its Interpretation Of Section 1437d(*l*)(6).

Petitioners' citation to statutes outside sections 1437d(*l*)(6) and 881(a)(7) also offers them no support. HUD first makes reference to former section 1437d(c)(4)(A)(iii). HUD Br. at 31-32. As a preliminary matter, the language upon which HUD relies was superceded in 1996, and the language of the current version does not support HUD's claims. The Ninth Circuit was properly "hesitant to even address an argument for harmonious interpretation when there is no longer a provision to harmonize." HUD Pet. App. at 19a.

Even if the former version of section 1437d(c)(4)(A)(iii) were relevant, it does not support HUD's contentions. This section prevented individuals or families who were evicted because of drug-related criminal activity from receiving a statutory housing preference for three years. It provided an exemption for family members who the agency determined "clearly did not participate in and had no knowledge of such criminal activity." 42 U.S.C.A. § 1437d(c)(4)(A)(iii) (1991).

HUD's strained reading of this superceded statute is misdirected. The plain language of section 1437d(c)(4)(A)(iii) shows Congress's desire to protect the innocent by ensuring that the culpability of a tenant or household member directly engaged in drug activity was not transferred to innocent individuals sharing the same housing. Many public housing households include the elderly, minor children, the disabled, the infirm and others dependent on the physical presence of an adult tenant for daily life. In circumstances where the tenant on the lease engages in drug activity and is evicted, the household members, although totally innocent of wrongdoing would, by necessity, leave public housing with the culpable individual. When it existed, section 1437d(c)(4)(A)(iii) barred denial of future public housing for these innocent dependents solely because of their association with the evicted

wrongdoer; section 1437d(c)(4)(A)(iii) provided that the sins of their caregivers would not be visited upon them.

4. Sections 1437d(*l*)(6) And 881a(7) Perform The Same Function And Accomplish The Same Result.

Finally, HUD's attempt to differentiate sections 1437d(*l*)(6) and 881(a)(7) as unrelated statutes with "different mechanisms" is equally unavailing. HUD Br. at 29. HUD struggles to explain that the statutes are different because "[c]ivil forfeiture is a mechanism by which the government may seize a private property interest to which it previously had no relationship" while "Section 1437d(*l*)(6) is a mechanism by which the government takes back possession of property that it already owns." *Id.* This distinction is meaningless in the context of public housing. The tenant is rendered homeless, either by the forfeiture of the leasehold interest to the federal government or by the eviction by the PHA; in both cases the government has "taken back" the property. HUD also asserts in conclusory fashion that the statutes are different because section 881(a)(7) forfeits property *"to the United States"* while section 1437d(*l*)(6) reverts it *"to the local public housing authority."* *Id.* at 29-30 (emphasis in original). As the Ninth Circuit correctly observed, "[i]t makes little sense" to arbitrarily provide the innocent tenant defense on the basis of whether the federal or local government is the catalyst for eviction. HUD Pet. App. at 17a.

To the extent sections 1437d(*l*)(6) and 881(a)(7) have distinctive characteristics, they only highlight the irrationality of HUD's position. The government can only seek the severe sanctions of section 881(a)(7), subject to all of its attendant due process protections, when the rental unit was "used, or intended to be used" to commit a violation of the Controlled Substances Act "punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). The possibility of forfeiture does not arise until this threshold is crossed. Even when the alleged facts are egregious

enough to trigger section 881(a)(7), forfeiture cannot be used to take away the tenancy of an innocent tenant. In contrast, according to HUD, a PHA has the absolute, unfettered power to evict a tenant innocent of any wrongdoing for any alleged drug activity outside the rental unit even though that activity may result in no arrest or criminal conviction, and amounts to no more than a minor criminal infraction subject only to a minimal fine and no imprisonment. It defies logic to conclude, as do Petitioners, that Congress intended to give the PHAs carte blanche to deprive innocent tenants of their homes for any drug activity no matter how minor, while at the same time providing that HUD could not deprive a public housing tenant of his or her home if innocent of wrongdoing, even though the drug activity was serious and the premises were used in connection with that activity.

II. HUD'S INTERPRETATION OF SECTION 1437d(*l*)(6) AND OHA'S APPLICATION OF ITS LEASE PROVISIONS ARE UNREASONABLE AND CONTRARY TO CONGRESS'S INTENT.

Despite the complete absence of any language reflecting Congress's alleged intent to give HUD and the PHAs the absolute power to arbitrarily seek to evict tenants who are guilty of no wrongdoing and to deprive an innocent tenant of his or her due process protection in the enactment of section 1437d(*l*)(6), HUD has crafted a regulatory scheme that actually prizes the ability of a PHA to evict a tenant innocent of any wrongdoing. HUD has attempted to mask its scheme of eviction without any due process protection by announcing that PHAs should act with "wise and humane judgment" in handling drug-related lease revocations, *Termination of Public Housing Tenancy for Drug-Related Criminal Activity*, 54 Fed. Reg. 15,998 (April 20, 1989), and that PHAs have the "discretion to consider all of the circumstances of the case, including . . . the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." *Public Housing Lease*

And Grievance Procedures, 56 Fed. Reg. 51,560 at ¶ 3.3.3 (October 11, 1991). However, in their briefs both HUD and OHA insist that there is no obligation that the PHAs exercise this discretion. Rather they assert that section 1437d(*l*)(6) gives the PHA the absolute power to evict without regard to innocence. In reality, Petitioners' position is that Congress, in enacting section 1437d(*l*)(6), intended to eliminate all due process protection in drug-related evictions.

HUD's actions and pronouncements belie its claim that, although the PHAs have unfettered power to evict, HUD has encouraged them to act with humane discretion when dealing with evictions involving innocent tenants. A PHA "may proceed with a civil eviction for criminal activity by family members or guests regardless of whether a criminal prosecution has commenced or completed." 56 Fed. Reg. 51,560 at ¶ 3.3.5. Once a PHA decides on its own to evict, HUD emphasizes that the PHA's discretion to protect innocent family members is purely optional. 66 Fed. Reg. at 28,782-28,783. It is an option that HUD does nothing to encourage and instead provides incentives, as discussed below, to discourage. HUD grants PHAs "full authority to initiate eviction" without requiring them to consider, let alone provide, any due process protection to innocent household members. 54 Fed. Reg. at 15,998.

As HUD, OHA and the amici curiae make clear in their briefs, they believe the need to punish innocent tenants by eviction is essential to motivating compliance with federal anti-drug efforts by public housing residents. Protecting tenants who "did not know, could not foresee, or could not control behavior by other occupants" would, in HUD's jaundiced view, only provide excuses for evading responsibility and "undercut the tenant's motivation to prevent criminal activity by household members." 56 Fed. Reg. 51,560 at ¶ 3.3.1. Indeed, shortly after enactment of the current version of section 1437d(*l*)(6) in 1996, HUD issued "One Strike and You're Out" Guidelines to PHAs advising them on the need to implement a "strict" policy to ensure "certain and swift eviction." HUD Notice PIH

96-16 at "Background" (April 12, 1996) (available at www.hudclips.org). Despite claims of encouraging benign discretion, HUD actively advised PHAs to "[m]ake tenants responsible for the conduct of everyone in their households." *Id.* at section III.5. "A promise is a promise. . . . [A] tenant is responsible for the household, regardless of whether he or she was personally engaged in the prohibited drug or other criminal activity." *Id.* Holding the innocent tenant hostage is a linchpin in HUD's anti-drug regulations.

HUD has underscored the emptiness of PHA discretion as a means of protecting innocent tenants by implementing strong rewards and punishments to compel PHAs to evict without exercising discretion. In 1996, HUD implemented the Public Housing Management Assessment Program (PHMAP) to "provide incentives for PHAs to aggressively implement One Strike policies." *Id.* at section I.a. As President Clinton summarized in announcing the rewards program, "for the first time, there will actually be penalties for housing projects that do not fight crime and enforce 'one strike and you're out.'" 32 Weekly Comp. Pres. Doc. 582 (March 28, 1996). Under PHMAP, which was in effect when Respondents' evictions were filed, HUD graded PHAs from A to F on the basis of several factors. *See* 24 C.F.R. § 901 (2001). Under the "lease enforcement" criteria, HUD awarded an A grade to a PHA that could document that it "appropriately evicts any public housing resident" for drug-related activity. *Id.* at § 901.45(c). A PHA received an unfavorable grade if it could not document such evictions. *Id.* PHAs that aggressively evicted tenants and got high grades enjoyed an array of rewards, while PHAs that did not faced budget limitations and other sanctions. *Id.* at §§ 901.130, 901.135. In 1999, PHMAP was superceded by the Public Housing Assessment System, 24 C.F.R. § 902 (2001), which similarly makes HUD rewards and punishments contingent on aggressive implementation of "one-strike" evictions. *Id.* at § 902.43; *see also Public Housing Assessment System*, 63 Fed. Reg. 46,596 at 46,621 (September 1, 1998).

HUD goes even further and asserts that the PHA's eviction decision cannot be contested in any meaningful way by a tenant asserting his or her innocence of any wrongdoing. HUD insists that courts cannot review a PHA's failure to consider the innocence of the evicted tenant or any of the "social and situational factors that HUD's regulations authorize, but do not require, a PHA to consider." 66 Fed. Reg. at 28,782. In HUD's view, courts are limited solely to a mechanical determination of "whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction." *Id.*

By opposing judicial review of any sort, HUD closes the circle on its denial of basic due process to public housing tenants. HUD has excused on a blanket level the obligations of PHAs to follow the administrative due process provisions of the Housing Act in drug-related evictions. The ostensible basis of this blanket exclusion is HUD's "due process determination" certifying that a state or local court allows the tenant the right "to present any affirmative legal or equitable defense which the tenant may have" before eviction. 24 C.F.R. §§ 966.51(a)(2), 966.53(c)(3) (2001). But as this case amply demonstrates, HUD, based on its interpretation of section 1437d(*l*)(6), has told the PHA that there is no innocent tenant defense that need be considered by the PHA when making its eviction decision, and HUD would deny to any court the right to consider such a defense in any eviction action brought by the PHA. The end result is a denial of any meaningful protections to innocent public housing tenants and a grant of unbridled power to a governmental body.

OHA's attack on the elderly and disabled Respondents in this case illustrates the fundamental unfairness and irrationality of Petitioners' actions. In 1998, when Petitioners launched their eviction campaign, Respondent Pearlie Rucker was a 63-year old African-American woman who had lived in public housing for 13 years. HUD Pet. App. at 141a. Ms. Rucker was the head of a household that included her mentally-disabled daughter,

Gelinda, two grandchildren and one great-granddaughter. *Id.* Although Petitioners refer to Ms. Rucker's son, Michael, OHA Br. at 10-11, he did not reside in her public housing apartment. *Id.* Petitioners sought to evict Ms. Rucker and her entire household because Gelinda allegedly possessed cocaine three blocks away from Ms. Rucker's apartment. The district court expressly found, and Petitioners have never contested, that Ms. Rucker "had no knowledge of Gelinda's drug activity; regularly searches her room for evidence of alcohol and drug activity; and has warned her disabled daughter and others that any drug activity on the premises can result in eviction." HUD Pet. App. at 141a; *see also* J.A. at 43-44.

Respondent Willie Lee was a 71-year old African-American woman who had lived for 25 years in public housing managed by Petitioner OHA. Respondent Barbara Hill was a 63-year old African-American woman who had lived in public housing for 30 years. HUD Pet. App. at 142a. Petitioners sought to evict Ms. Lee and Ms. Hill and their households because their grandsons, who reside with them, allegedly possessed marijuana in the parking lot of the housing complex. *Id.* Again, the district expressly found, and Petitioners have not contested, that neither Lee nor Hill had any knowledge of their grandsons' alleged drug-related activity, and that both Respondents "had warned their household members that any drug use or criminal activity on the premises can result in eviction." HUD Pet. App. at 142a; *see also* J.A. at 31, 34.

Respondent Herman Walker was a 75-year old disabled African-American man who had lived in public housing for eight years. HUD Pet. App. at 142a. Because of his disabilities, Mr. Walker cannot live independently and must have an in-home caregiver. *Id.*; *see also* J.A. at 36-37. Petitioners sought to evict Mr. Walker because his caregiver and guests the caregiver brought into Mr. Walker's apartment allegedly possessed cocaine. HUD Pet. App. at 142a. As the district court found, Petitioners do "not allege

that Walker engaged in drug activity or was aware of such activity." *Id.*[10]

The district court and the Ninth Circuit were correct in finding that the evictions of Respondents under these circumstances constituted an abuse of governmental power.

III. PETITIONERS OFFER NO RATIONAL JUSTIFICATION FOR SACRIFICING A TENANT'S DUE PROCESS RIGHTS IN THE WAR ON DRUGS.

Petitioners' expansive interpretation of the application of the lease provisions of section 1437d(*l*)(6) cannot be justified as reasonably necessary to fight the war on drugs as argued in their briefs and the briefs of amici. Respondents, who have as great an interest, if not a greater interest, as any other public housing tenant in seeking to free public housing units from the scourge of drugs, have no argument with a policy that enforces the provisions of section 1437d(*l*)(6) against actual wrongdoers. But it is without dispute that Respondents fit none of the categories of individuals against whom Congress intended this statute to be directed – drug dealers, drug users, gang members, muggers, murderers. Respondents are the very victims that Petitioners assert it was Congress's intention to protect. Petitioners argue that Congress's response to "the drug related 'reign of terror' . . . was to arm PHAs with greater authority to remove those tenants who it believed should be held accountable for the problem." HUD Br. at 34. It then seeks to justify holding innocent tenants, such as Respondents, "accountable" and throwing them out of their homes on four grounds, HUD Br. at 35-37, none of which is supportable, particularly in a legal system that does not permit the sacrifice of innocent individuals on the altar of some allegedly worthy social purpose. As this Court has warned, "[r]egardless of how

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[10] Petitioners have not challenged these findings or Mr. Walker's ADA claims, and these issues are not before this Court.

serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Brown & Williamson*, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Moreover, to the extent Congress contemplated a "reign of terror," it appropriately focussed on the dangers posed by drug dealers, gangs, crack houses, and other major problems. *See* S. Hrg. 101-234, *Drugs in Federally Assisted Housing, Hearing Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking, Housing and Urban Affairs*, at 1 (July 20, 1989) (opening statements of Senator Cranston, expressing concern regarding "open drug markets, heavily armed drug dealers, shadow buyers and violent death."); *Drug-Related Criminal Activity in Public Housing*, 135 Cong. Rec. H3942-01, H3943 (daily ed. July 19, 1989) (statement of Rep. Wylie expressing the need to evict "drug terrorists") (available at 1989 WL 193081). The elderly and disabled Respondents here could not be farther from the objects of Congress's attentions.

HUD's first attempted justification is that holding the tenant accountable creates an incentive to the tenant to find out whether or not a household member, guest or other person is engaging in drug-related criminal activity, to warn them of the serious consequences and to take steps to "protect the security of the housing project." HUD Br. at 35. Assuming that the tenant takes all these steps that HUD suggests, how does the denial to that tenant of the opportunity to present his or her actions as a defense to eviction add to the incentive? Common sense would indicate that it has exactly the opposite effect; that same common sense would appear to dictate that the way to encourage the tenant to take the steps HUD alleges would be helpful to rid the public housing units of drugs would be to allow the tenant in any eviction proceeding to demonstrate that he or she is innocent of any wrongdoing and, consequently, avoid eviction.

HUD's second attempted justification is predicated on an unfounded assertion that allowing the tenant to raise

the defense of innocence places some insurmountable burden on a PHA seeking an eviction. HUD Br. at 35-36. In the first place, it is the tenant who has the burden of raising and proving the defense. The government's burden of rebuttal is no more onerous that it is in connection with any other affirmative defense. Further, Congress put these same "difficulties" on HUD in section 881(a)(7) and its recent enhancements. HUD has not suggested that the existence of an innocent tenant defense makes the provisions of section 881(a)(7) of "limited value in restoring peace and security to public housing projects." HUD Br. at 35. There is no reason to think that an innocent tenant defense to an eviction for an alleged violation of section 1437d(*l*)(6) limits its value for that same purpose. Equally destructive of HUD's claim that an innocent tenant defense would impose an impossible burden of enforcement is the fact that a number of local jurisdictions already have permitted safeguards against the eviction of innocent tenants. There is absolutely no showing that evictions for drug activity in those jurisdictions have been rendered ineffective, or that the local PHAs in those jurisdictions are incapable of dealing with drug activities in their public housing projects. *See, e.g.*, B. Johnson, *The Severest Justice Is Not The Best Policy*, 10 J. of Affordable Housing and Community Development Law 234, 261-62 (Spring 2001) (discussing lack of hindrance under innocent tenant state law in Massachusetts).

The third justification advanced by HUD appears to be, in part, a subset of its first justification: the deterrent effect on household members when they understand the impact of their committing a drug violation, and as a bargaining chip for the PHAs who might wish to bar an individual from the premises. HUD Br. at 36. Suffice it to say that it is difficult to understand how evicting the innocent tenant advances the deterrent effect which, by reason of the violation, has proven to be ineffective. The alleged "bargaining chip" justification is even more a product of pure conjecture. Given Petitioners' belief that it is necessary to arbitrarily evict in order to eliminate drugs

from public housing projects, it is totally unrealistic to suggest that a tenant will go to the PHA, tell the manager that a member of the household is engaged in drug activity, and ask the manager to provide assistance. If voluntarily going to the manager does not provide a defense to an attempted eviction, why invite eviction? Better to deal with the problem as best you can when the alternative is certain loss of your home.

Finally, HUD justifies its interpretation of Congress's intent by pleading that public housing is in short supply and that a family, even if it has only one bad actor, doesn't deserve to live there because it is a "threat" to its neighbors. HUD Br. at 37. Admittedly, public housing may be in short supply, but that hardly justifies throwing innocent people out of their homes and HUD's one bad apple, bad family argument is backed up by no authority, much less competent authority. There is no showing that Pearlie Rucker's daughter ever posed a threat to her neighbors; there is no showing that Willie Lee's and Barbara Hill's grandsons smoking a marijuana cigarette ever posed a threat to their neighbors. This is not to excuse the conduct of those individuals, but the appropriate remedy is to deal with the wrongdoer, not to place the blame on the entire family and use it to justify evicting the innocent family member from the home.

What makes Petitioners' extreme interpretation of their power to evict innocent tenants particularly objectionable is the fact that it is totally unnecessary to accomplish the goal articulated by Congress when enacting this statute. While HUD candidly acknowledges that it values the *in terrorem* effect of holding innocent tenants hostage under its no-fault policies, HUD Br. at 35, HUD has conceded the existence of a wide range of effective enforcement mechanisms that do not sacrifice the rights of the innocent. HUD admits that it can resolve drug problems simply by imposing "a condition that family members who engaged in the proscribed activity will not reside in the unit" without evicting the entire family. 56 Fed. Reg. 51,560 at ¶ 3.3.3. HUD expressly advises PHAs that they

can permit "a household to remain in occupancy on the condition that the offending member move and agree not to return." HUD Notice PIH 96-16 at § III.5. "[T]respass laws and restraining orders" are available to enforce the ban on culpable wrongdoers. *Id.* These common-sense approaches eviscerate HUD's assertions here of the need for wholesale evictions of innocent tenants. The argument advanced by *amici curiae* Council of Large Public Housing Authorities, *et al.* in their brief at pages 21-22 that suggests that eviction does not permit selective eviction of wrongdoers and is the only weapon in its arsenal for eliminating a member of a household who participates in drug activities is simply untrue, as HUD's own regulations make clear.

Evicting innocent tenants does not serve HUD's professed goals because an innocent tenant by definition had no knowledge of the alleged criminal activity or had taken reasonable steps to prevent it. Evicting innocent tenants will not make public housing safer; it will only increase the number of victims of someone else's drug activity. Petitioners' overbroad interpretation of section 1437d(*l*)(6) actually works against the goals of national public housing policy by exposing innocent low-income tenants to the threat of homelessness for no rational reason.[11]

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[11] HUD's claim that the innocence defense will create a "perverse incentive for tenants to remain ignorant" of drug activity, HUD Br. at 35, misses the mark. The established concept of culpability for "willful blindness" answers this alleged concern. This concept has already been read into the innocent tenant defense under section 881(a)(7). *See 121 Nostrand Ave*, 760 F. Supp. at 1033 ("[L]ack of knowledge should be construed to mean absence of 'willful blindness.' ").

IV. PETITIONERS' INTERPRETATION OF SECTION 1437d(*l*)(6) RAISES SERIOUS CONSTITUTIONAL ISSUES.

In addition to lacking any support in congressional intent, HUD's extreme regulatory interpretations pose several fatal constitutional flaws. Statutes should be construed to avoid substantial constitutional concerns. *X-Citement Video, Inc*, 513 U.S. at 73, 78 ("It is . . . incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

HUD's interpretation inherently violates due process and imposes unconstitutional forfeitures and excessive fines. It also embodies a policy antithetical to the sanctity of the family. Respondents' construction of Congress's intent completely avoids these serious infirmities. On this basis alone, this Court should reject HUD's regulations and affirm the Ninth Circuit's decision. *See X-Citement Video*, 513 U.S. at 78 (declining to address the constitutional issue where an alternate construction avoided the question and was "not plainly contrary to the intent of Congress").

A. Petitioners Assert The Right To Seize A Tenant's Leasehold Without Due Process.

The arbitrary and unfair deprivation of housing inflicted on innocent tenants by HUD's policies patently violates due process. This Court has strongly emphasized the importance of the property interests that are made subject to the unfettered discretion of the PHAs.

> The right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the

> personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). These rights and interests merit special protection when they involve the home. " '[S]afeguarding the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.' " *Hodgson v. Minnesota*, 497 U.S. 417, 448 n.33 (1990) (quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

HUD's and the PHAs' seizure of public housing from innocent tenants is precisely the kind of arbitrary deprivation of property that due process forbids. "[T]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998) (internal quotations and citations omitted).

Public housing tenants indisputably hold protected property rights in their leases. Congress amended section 881(a)(7) in the Anti-Drug Abuse Act expressly to declare that public housing leases are property. *See* Section I.B above. The courts have also held that "a public housing tenant's interest in his apartment is a property interest protected by the Constitution." *121 Nostrand Ave.*, 760 F. Supp. at 1027 (citing *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861 (2d Cir. 1970)). Like other property rights, these leasehold interests enjoy constitutional protection. "The expectation of uninterrupted occupation and privacy exist whether the home is held in fee or by lease. A leasehold is subject to constitutional protections against arbitrary forfeiture to the Government." *Id.*

(citing *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976)); *see also Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (finding public housing tenants had "been deprived of a significant interest in property: indeed, of the right to continued residence in their homes").

Government action that strips innocent individuals of these property interests on the basis of guilt by association violates due process. As Justice Stevens has observed, "[f]undamental fairness prohibits the punishment of innocent people." *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting). In our justice system, it is "axiomatic that persons cannot be punished when they have done no wrong." *Id.* at 467 (and cases cited therein).

This Court has repeatedly imposed the requirement of culpability to guard against such arbitrary government action. In *Scales v. United States*, 367 U.S. 203 (1961), the Court confronted a statute criminalizing membership in subversive organizations and found that the statute necessarily required for conviction proof that a member was an "active" member with knowledge of, and the specific intent to further, the organization's illegal purposes. The Court deemed this interpretation necessary to avoid the serious constitutional question that would be raised by the lack of personal culpability:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25.

The constitutional requirement of personal culpability applies with equal force even when the government purports to terminate a discretionary public benefit. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Court struck down a loyalty oath statute that permitted the state to

exclude persons from public employment solely because of organizational membership and without regard to their knowledge about the organization. *Id.* at 190. Under the statute, "[a]ssociation alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly." *Id.* at 191. Because the statute inflicted sanctions in the absence of personal culpability, the Court invalidated it on due process grounds. "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." *Id.*

Significantly, the Court rejected the government's argument that the condition was valid because there is no absolute right to public employment:

> To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 191-92.[12]

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[12] This Court has noted in several cases that calling something a government benefit or privilege does not insulate the government's actions from constitutional defects. *See, e.g., Keyishian v. Regents*, 385 U.S. 589, 605-606 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has uniformly been rejected."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."); *see also Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678-679 ("The recipient of a government benefit . . . cannot be made to forfeit the benefit because he exercises a constitutional right . . . . No more can a tenant in a public housing project be evicted for

This Court has applied the same limiting principle of personal culpability in a variety of different factual and constitutional contexts. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court applied the principle to reject the claim that liability may be imposed solely for an individual's association with an organization that commits unlawful acts. Without proof that the individual had a specific intent to further criminal acts, "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920.

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court invalidated a statute that excluded undocumented immigrant children from public schools. As the Court held, the government cannot seek to deter the immigration violations of adults by depriving their children of public schooling:

> [T]he children who are plaintiffs in these cases can affect neither their parents' conduct nor their own status. Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Id. at 219-20 (internal citations omitted). Similarly, in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), the Court struck down a statute treating unacknowledged illegitimate children differently from other children for purposes of receiving worker's compensation payments. The Court applied the same principle recognized in *Plyler* that depriving children of benefits to deter parental conduct "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing . . . penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent." *Id.* at 175-76.

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the exercise of her right of association, a right protected by the First and Fourteenth Amendments.") (Douglas, J., concurring).

Petitioners' policy of terminating the property rights of innocent tenants in their leases breaches the limiting concept of culpability imposed by this Court as a fundamental guarantee of justice and fairness. Petitioners insist they have the right to dispense with all considerations of culpability and evict tenants based solely on the alleged drug activity of their household members, even where the activity occurs off the premises, without the tenant's knowledge and despite their reasonable steps to discover and prevent such activity. In these extended circumstances, the tenant has no relationship whatsoever to the drug activity, let alone the "substantial" relationship necessary to satisfy due process. *Scales*, 367 U.S. at 224-25. Just as group or family association alone is insufficient to supply a substantial relationship to wrongdoing, the mere fact that a tenant shares a residence with an alleged wrongdoer cannot justify seizing the tenant's protected property rights in the absence of any personal culpability.

Indeed, due process concerns apply here with particular force because the eviction of an innocent tenant is aimed at deterring not the tenant's own conduct but the wrongful conduct of family members merely because HUD and the PHA have dictated that the tenant is to be held "accountable" even though the circumstances might show that there was no way that the tenant could have exercised control. Petitioners' willingness to sacrifice the innocent without giving them an opportunity to establish their innocence is patently "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175.

B. Petitioners Seek To Deny Any Judicial Review Of Their Refusal To Allow An Innocent Tenant Defense.

Petitioners compound the due process violations inherent in punishing the innocent by purporting to completely foreclose any substantive judicial review of evictions under section 1437d(*l*)(6). Petitioners expressly deny that any court can review the reasonableness and fairness of a drug-related eviction or the manner in which a PHA exercises its "discretion" about such evictions. As HUD contends, "conferral of discretion on PHAs in deciding whether to terminate tenancy in each case does not constitute conferral of discretion on local courts to consider factors other than those appropriate under the lease." 66 Fed. Reg. at 28,783. According to Petitioners, the eviction court cannot review the reasonableness of the PHA's action in seeking eviction for the violation of the lease provision and the tenant cannot present an innocent tenant defense. The court's review is limited to an empty ministerial determination of "whether a violation of the lease has occurred and whether the lease provides that such violation is grounds for eviction." *Id.* at 28,782.

Petitioners purport to award themselves sweeping administrative powers unchecked by any judicial review to assure these powers are not used arbitrarily or unreasonably. Petitioners claim an absolute right to decide whether or not to deny the nation's poorest citizens their only decent housing without any judicial oversight to guarantee that Petitioners do not act capriciously or in response to whim, prejudice or even corruption. The arbitrary treatment afforded Respondent Rucker illustrates Petitioners' caprice. Petitioners originally sought to evict Ms. Rucker despite her innocence of any knowledge of or involvement in drug activity, and then abruptly decided to abandon the eviction after she obtained counsel and it was clear that the eviction would be opposed. While Petitioners trumpet the decision to drop Ms. Rucker's eviction as a sign of beneficent discretion, it only underscores how

arbitrary Petitioners' "discretion" is in practice. The next innocent tenants should be protected from Petitioners' thumbs-up or thumbs-down decisionmaking with basic procedural protections and review in court.

To reach the extraordinary conclusions they do on these issues, Petitioners must ignore not only basic due process considerations but HUD's own regulations. HUD has exempted the PHAs from the statutory administrative procedural protections for drug-related evictions in section 1437d(k) by issuing due process "waivers" for 48 of 50 states. *See Notices of HUD Due Process Determinations*, 61 Fed. Reg. 13,276-01 (March 26, 1996); 61 Fed. Reg. 47,953 (September 11, 1996); 62 Fed. Reg. 45,434-01 (August 27, 1997). By HUD's own regulations, these waivers are possible if and only if HUD has made a "due process determination" that the "law of the [PHA's] jurisdiction requires that the tenant must be given the opportunity for a hearing in court which provides the basic elements of due process." 24 C.F.R. § 966.51(a)(2)(i) (2001). HUD defines the basic elements of due process to include the "[o]pportunity for the tenant . . . to present any affirmative legal or equitable defense which the tenant may have." *Id.* at § 966.53(c)(3).

Petitioners' hostility to meaningful judicial review also contradicts Congress's intentions about the role of eviction courts in drug-related evictions. Congress expressly believed that eviction courts would play a substantive role in reviewing a PHA's exercise of discretion. In Senate Report 101-316 discussed above, the Senate Banking, Commerce and Urban Affairs Committee stated that it "anticipates that each case will be judged on its individual merits and will require the wise discretion and humane judgement by the PHA and the eviction court." S. Rep. 101-316, at 179, 1990 U.S.C.C.A.N. at 5941; *see also id.* at 183, 1990 U.S.C.C.A.N. at 5945 (noting availability of statutory due process waiver only when "the tenant will have an opportunity for a hearing in state court which provides the fundamental protections of due process" and that

"state courts are often better able to interpret state landlord-tenant laws" than a PHA grievance panel). As these comments indicate, and in sharp contrast to Petitioners' contentions, Congress contemplated a meaningful role for courts in reviewing eviction decisions. In fact, HUD itself has previously acknowledged that "the one-strike policy must be implemented within the context of the applicable State laws and court systems." *Public Housing Management Assessment Program*, 61 Fed. Reg. 68,894 at 68,923 (December 30, 1996).

Petitioners' effort to avoid due process violations by suggesting that they are simply enforcing a lease contract, HUD Br. at 47-48; OHA Br. at 40-41, is unavailing because it ignores that Petitioners are governmental entities exercising governmental powers. In the public housing context, "[i]t is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. . . . The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." *Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) (quotations and citations omitted).

Petitioners' strained arguments to construe public housing leases as equivalent to private sector rentals fundamentally misconstrues the unique nature of public housing. As Petitioners themselves concede, existing public housing is a scarce resource that does not even begin to meet the demand created by millions of impoverished individuals and families. HUD Br. at 37. In the absence of public housing, many families face homelessness or unstable and unpredictable transient housing in shelters and other stopgaps. The grossly unequal bargaining positions of the government and public housing tenants wholly distinguishes public housing leases from private rentals. To obtain their one chance at decent housing, tenants and applicants for public housing will accept any tenancy terms the government seeks to impose, including terms that no private tenant would even consider accepting. The

due process constraints noted by Justice Douglas serve to correct this imbalance in favor of protecting public housing tenants.

Even if public housing tenancies were equivalent to private rentals, basic contract law shows PHA leases would be unenforceable against innocent tenants. In situations of unequal bargaining power, a contract term beyond the reasonable expectations of the tenant, the weaker contracting party, is unenforceable. *See, e.g., Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 (1981) ("[A] contract or provision that does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him" and "a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable'."); *see also* Restatement of Contracts (Second) § 208, comment d (1981) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.").

Even if a private lease survived under this scrutiny, eviction of an innocent private tenant does not rise to the certainty Petitioners suggest. In California, "forfeitures of leases are not favored by the law." *Keating v. Preston*, 42 Cal. App. 2d 110, 115 (1940). A lease "condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal. Civ. Code § 1442. Moreover, because of the severe penalty that can be inflicted by the loss of a lease, an eviction court is empowered to "relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship." Cal. Civ. Proc. Code § 1179. Assessing hardship requires the court to balance the equities, including the "willful or other character of the breach." *Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 777-78 (1985). Consequently, forfeiture in

the private sector is not the automatic event Petitioners suggest.

Significantly, nothing in PHA leases constitutes an unambiguous agreement by innocent tenants to be subjected to eviction for the drug activity of others. Section 9m of respondents' leases provides that the tenant must "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . Any drug-related criminal activity on or near the premises." J.A. at 59. A tenant could reasonably understand the term "assure" to mean an obligation to exercise only reasonable efforts to control their household members' conduct. A tenant could also reasonably expect the "control" element to be applied consistently with its plain meaning to restrict eviction to cases where the tenant can "exercise a restraining influence over" the wrongful conduct of household members and guests. Further, paragraph 14d of the leases provides that the PHA "may terminate . . . this lease for the Tenant's serious or repeated violation of material terms of this lease such, as . . . not complying with paragraph 9, or other good cause." J.A. at 64. A reasonable reading of paragraphs 9m and 14d in conjunction is that only "serious and repeated" drug activity by a household member will be grounds for termination.

The other ancillary agreements in the record heighten the ambiguity of the leases. In the Occupant's Responsibility form, the tenant agrees to be "responsible for all damages and the conduct of all activities in my apartment," clearly suggesting that there is no responsibility for conduct occurring outside the apartment. J.A. at 68. The Tenant Agreement to Maintain a Drug-Free Environment states that "I understand that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted. I agree . . . to do all I can to prevent the use, sale or possession of drugs in my unit or the involvement in drug-related criminal activity by my household or guests." J.A. at 69. The most reasonable reading of these sentences

is that the tenant may be evicted for household member drug activity only where the tenant has breached the agreement to take reasonable preventive measures.

C. Eviction Of An Innocent Tenant Constitutes An Unconstitutional Forfeiture Of A Property Right.

This Court's teachings on forfeiture highlight the unconstitutionality of Petitioners' policy. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court underscored the constitutional defects inherent in forfeiting the property of innocent owners:

> [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. [Citations omitted.] Similarly the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90.[13] *See also Austin v. United States*, 509 U.S. 602, 629 (1993) ("At some point, we may have to confront the constitutional question of whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question.") (Kennedy, J., concurring).

Petitioners purport to rely on *Bennis v. Michigan*, 516 U.S. 442 (1996) to escape the constitutional concerns expressed in *Calero-Toledo* and *Austin*. Petitioners contend

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[13] As discussed above, Congress formally codified that defense in the Civil Asset Forfeiture Reform Act of 2000 and made it applicable in all forfeiture proceedings.

that *Bennis* permits a state to seize an individual's property "with no showing that she has engaged in any wrongdoing, intentional or otherwise." HUD Br. at 47. Petitioners also assert that this Court definitively rejected in *Bennis* the innocence of the owner of property as a defense to forfeiture. OHA Br. at 41.

Petitioners' selective reading of *Bennis* does not excuse the due process injuries they inflict under section 1437d(*l*)(6). Despite Petitioners' protests, *Bennis* turned on the basic civil forfeiture principle that the property forfeited must be connected to a crime.[14] *Bennis* upheld the forfeiture of petitioner's car because it was the instrumentality used to facilitate illegal sexual activity with a prostitute. *See Bennis*, 516 U.S. at 446 ("[P]roperty may be forfeited by reason of the use to which the property is put"). As the concurring opinions emphasized, "[t]he Bennis automobile, it is conceded, facilitated and was used in criminal activity," and "Mrs. Bennis has not asserted that the car was not an instrumentality of her husband's crime." *Id.* at 453, 455 (Thomas, J., concurring); *see also id.* at 457-58 ("[I]t bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis. At all times he had her consent to use the car, just as she had his. . . . Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment.") (Ginsburg, J., concurring).

In addition, unlike the position asserted by Petitioners, the state statute at issue in *Bennis* was construed to allow a court to exercise its equitable discretion to deny forfeiture. Forfeiture was in fact authorized only after careful consideration by the courts of the equitable factors

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[14] This nexus is particularly clear under section 881(a)(7). As Justice Kennedy observed, section 881(a)(7) assures that "only property used to facilitate a drug offense is subject to forfeiture and consequently only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime." *United States v. Ursery*, 518 U.S. 267, 294 (1996) (Kennedy, J., concurring).

in that case. *See id.* at 444 ("In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law."), and 457 ("[T]he state's Supreme Court stands ready to police exorbitant applications of the statute.") (Ginsburg, J., concurring).

In light of these critical differences, *Bennis* not only lends no support to Petitioners' extreme reading of section 1437d(*l*)(6) but actually underscores the dramatic overbreadth of HUD's policy. Even under *Bennis*, termination of Respondents' leasehold interests would be invalid. Here, the alleged drug activity occurred off the tenants' premises, and their apartments and associated leasehold interests could not remotely be characterized as the instrumentality of any crime. In addition, the evictions Petitioners seek here would result in forfeiture of property in which the alleged wrongdoers, who are authorized residents but not the leaseholders, have no direct interest. And Petitioners here contend no safety valve exists under section 1437d(*l*)(6) to allow an impartial reviewing court to act in equity to prevent "exorbitant applications of the statute." *Bennis* only highlights the constitutional infirmity of Petitioners' policy.[15]

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[15] Petitioners' reliance on *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), is similarly misplaced. *Haslip* affirmed that monetary liability may be imposed against corporations and employers on respondeat superior grounds without proof of direct fault. The purposes served by respondeat superior liability plainly have no application to, and cannot justify, the forfeiture of an indigent tenant's home for drug activity that the tenant has no ability to foresee or control. Further, even in the context of corporate respondeat superior liability, the Court in *Haslip* was careful to emphasize the corporation's indirect culpability, stating "Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents." *Id.* at 14. *Haslip* therefore cannot be read, even in general terms, to support the imposition of liability without any link to culpability.

D. Imposing A Penalty Of The Loss Of An Innocent Tenant's Leasehold Is An Excessive Fine.

Petitioners' policy of terminating leases of innocent tenants whose property is unconnected to crime also violates the Eight Amendment's excessive fine prohibition. "The purpose of the Eighth Amendment . . . was to limit the government's power to punish." *Austin*, 509 U.S. at 609. "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense'." *Id.* at 609-10 (emphasis in original). "[A] civil sanction that cannot fairly be said to solely serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 610 (internal citations omitted); *see also United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998).

Terminating the leases of innocent tenants is a punitive sanction subject to Eighth Amendment scrutiny. Petitioners unequivocally assert that their policy of terminating leases under section 1437d(*l*)(6) is intended to deter potential drug activity. HUD Br. at 36 (stating HUD's no-fault policy creates a "deterrent effect on the drug-related criminal conduct of other persons in public housing."); *see also* 56 Fed. Reg. 51,560 at ¶ 3.3.1 (stating a no-fault standard "gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction."). As this Court has held, "[d]eterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. And where, as here, a forfeiture reaches to property not actually used to commit a crime, it is "*ipso facto* punitive and therefore subject to review under the Excessive Fines Clause." *Id.* at 333 n.8. Furthermore, terminating the leasehold interests of innocent tenants cannot remotely be construed as "remedial" because it serves no purpose in compensating the government for a loss. *Id.* at 329. Consequently, Petitioners' policy falls within the purview of the Excessive Fines Clause.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Bajakajian*, 524 U.S. at 334. The forfeiture of property violates the Excessive Fines Clause if it is "grossly disproportional" to the offense it is intended to deter and punish. *Id.* Nothing could be more disproportional than taking from an innocent tenant property that was not the instrumentality of a crime. *Austin*, 509 U.S. at 627-628 ("[F]orfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense – the building, for example, in which an isolated drug sale happens to occur.") (Scalia, J., concurring).

Even if the threatened forfeitures were measured against the alleged drug offenses themselves (and Respondents' lack of culpability in those offenses were ignored), they would still be "grossly disproportional" in light of the minimal criminal penalties associated with the alleged infractions. *See id.* at 339 n.14 ("In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence."). Here, Respondents are facing eviction due to the alleged possession of apparently small amounts of drugs by their family members and guests. For instance, Respondents Barbara Hill and Willie Lee are being evicted due to their grandsons' possession of marijuana in amounts that might not warrant more than a $100 fine under California law. *See* Cal. Health & Safety Code § 11357(b).

As a final consideration, Petitioners' eviction policy threatens the risks of abuse that are the root of Excessive Fine review. In *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989), the Court found that the central purpose of the Excessive Fines Clause is to limit the government's ability to forfeit property "whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use." *Id.* at 272. By granting unchecked discretion to PHAs and simultaneously providing financial incentives for

PHAs to ignore individualized consideration in evictions, *see* sections II, IV.B above, HUD has created the very risks of misdirected and overzealous enforcement for which the Court expressed concern in *Browning-Ferris*. Accordingly, blind reliance on the "humane discretion" of PHAs – urged by Petitioners as the sole means of safeguarding tenants from unjust and excessive evictions – is insufficient and judicial review for proportionality as a check on PHA discretion is critical.

E. Petitioners' Actions Articulate A Profoundly Anti-Family Policy.

As the Court has made clear, "the Constitution protects the sanctity of the family precisely because the institution is deeply rooted in the Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984) (stating that "cohabitation with one's relatives" is one of the "highly personal relationships [entitled to] a substantial measure of sanctuary from unjustified interference by the State") (citations and quotations omitted). Of particular application here, the Court in *Moore* noted: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional protection." *Moore*, 431 U.S. at 504.

By ignoring personal fault and threatening tenants with eviction based solely on the conduct of those who live with or visit them, Petitioners' eviction policy places overbearing pressure on tenants to close their households as a means of protecting their only realistic source of housing. That pressure exists even if the tenant is ready and willing to take all reasonable steps to control their family members' conduct, because Petitioners' eviction scheme precludes any consideration of innocence as a

defense to eviction. For instance, where a parent or grandparent has no realistic means of controlling the conduct of their adolescent children or grandchildren at all times and at all places, the only way for the tenant to minimize the risk of eviction under Petitioners' policy is to exclude their children or grandchildren from the apartment altogether. Similarly, even where a grandparent is willing (or compelled by circumstance) to take custody of a grandchild, there would be pressure to exclude visitation by the child's parents, for fear that the parents may, without the tenant's knowledge, have engaged in drug activity outside the premises while deemed a "guest" under HUD's murky standards. No government policy, particularly the one of Petitioners' here that is so intimately bound up with the family and home, should ever impose a disincentive on the ability of families to care for their own.

CONCLUSION

For these reasons, this Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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